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“The pursuit of justice is a team effort.”

Newsletter

Legal News Briefs for Law Libraries & Defense Attorneys

UPDATE: “THE GOOD TIME BILL”

H.R.1475 ~ Federal Prison Work Incentive Act of 2009

On March 12th, 2009, Representative Danny Davis (D-IL) introduced H.R. 1457, to restore the former system of good time allowances toward service of Federal prison terms, and for other purposes, otherwise known as “The Good Time Bill”. He introduced a similar bill towards the end of the 2008 session. This bill would reduce the sentences of people in federal prisons by increasing the “good time” credit they could receive and save US tax-payers more than 2 billion dollars per year. The reduction would apply to all federal prisoners except the ones serving life sentences.

The Sentencing Reform Act of 1984 virtually abolished federal parole. Currently, people incarcerated in federal prison who were sentenced after the 1984 Act must serve the vast majority of their sentence no matter what, as the good-time credit they receive counts for very little. Today's federal prisoners are eligible to earn a maximum of 47 days per year of their sentence for early release by abiding by prison rules and regulations.

Obviously this bill, if it is passed

into law, would positively effect the vast majority of federal inmates. The longer the sentence being served, the more the inmate can benefit from the proposed good time changes. The Good Time Bill would increase the number of days a prisoner could earn towards early release to 60-120 per year, depending on the length of the sentence. An increased incentive for good behavior through a path toward early release will make prisons safer for prisoners and staff, while also helping to reduce the enormous strain of prison overcrowding on US taxpayers. It is not too late to write your congressmen and request their support for the Federal Prison Work Incentive Act of 2009.

The bill has been referred to the House Committee on the Judiciary. In essence, the bill would amend Title 18 of the United States Code, by inserting after chapter 307 the following:

CHAPTER 309 - GOOD TIME ALLOWANCES

§ 4161. Computation generally

(a) Each prisoner convicted of an offense against the United States and confined in a penal or correctional institution for a definite term other than for life, whose record of conduct shows that the prisoner has substantially observed all regulations promulgated by the Director of the Bureau of Prisons and has not been subjected to punishment, shall be entitled to a deduction from the term of his sentence imposed beginning with the day on which the sentence commences to run, and including time served in pretrial

confinement, as follows:

- (1) 5 days for each month of the sentence, if the sentence is not less than 6 months and not more than 1 year.
- (2) 6 days for each month of the sentence, if the sentence is more than 1 year and less than 3 years.
- (3) 7 days for each month of the sentence, if the sentence is not less than 3 years and less than 5 years.
- (4) 8 days for each month of the sentence, if the sentence is not less than 5 years and less than 10 years.
- (5) 10 days for each month of the sentence, if the sentence is 10 years or more.

(b) When 2 or more consecutive sentences are to be served, the aggregate of the several sentences shall be the basis upon which the deduction shall be computed.

§ 4162. Industrial good time

(a) A prisoner may, in the discretion of the Director of the Bureau of Prisons, be allowed a deduction from that prisoner's sentence of not to exceed 3 days for each month of actual employment in an industry or camp for the first year or any part thereof, and not to exceed 5 days for each month of any succeeding year or part thereof.

(b) In the discretion of the Director of the Bureau of Prisons such allowance may also be made to a prisoner performing exceptionally meritorious service or performing duties of outstanding importance in connection with institutional operations.

(c) Such allowance shall be in addition to commutation of time for good conduct, and under the same terms and

CONTENTS:

| | |
|------------------------------|-----|
| Good Time Bill..... | 1-2 |
| NLPA 2009 Victories..... | 2-3 |
| Louisiana Due Process..... | 3-4 |
| Cases of Interest..... | 4-5 |
| California Inmate News..... | 5-6 |
| Attorney News Spotlight..... | 6-7 |
| About NLPA..... | 8 |

conditions and without regard to length of sentence.

§ 4163. Discharge

Except as otherwise provided by law a prisoner shall be released at the expiration of the term of sentence less the time deducted for good conduct. A certificate of such deduction shall be entered on the commitment by the Warden or keeper. If such release date falls upon a Saturday, a Sunday, or on a Monday which is a legal holiday at the place of confinement, the prisoner may be released at the discretion of the warden or keeper on the preceding Friday. If such release date falls on a holiday which falls other than on a Saturday, Sunday, or Monday, the prisoner may be released at the discretion of the warden or keeper on the day preceding the holiday.

§ 4164. Forfeiture for offense

If during the term of imprisonment a prisoner commits any offense or violates the regulations promulgated by the Director of the Bureau of Prisons, all or any part of his earned good time may be forfeited.

§ 4165. Restoration of forfeited commutation

The Director of the Bureau of Prisons shall by regulation provide for the criteria for and means of restoration of any forfeited or lost good time or portion.

NLPA CONTINUES A TREND OF EXCELLENCE - A RECAP ON OUR SUCCESSFUL CASES DURING 2008

During the year 2008 NLPA enjoyed sharing in its victories with many of our clients. Below is out an outline of the victories during the year that we felt deserved an "honorable mention".

Payne, A. - NLPA assisted Attorney Charles Murray in the research and preparation of a §3582 crack-cocaine guideline motion. This was filed in the USDC MD FL (Case No. 2:05-CR-00071-1). The motion having been granted resulted in Mr. Payne receive a reduced sentence from 148 months to 122 months - saving him more than two years in prison.

Tedder, M - NLPA assisted Attorney Elliot Newcomb in the case of US v. Tedder (USDC MD, Case No. 1:06-CR-00331-3) with sentencing research. Mr. Tedder was facing 262-327 months in prison. However, at his sentencing the court imposed a sentence of 168 months - saving Mr. Tedder more than

eight years in prison!

Ross, K - NLPA was hired to prepare a case evaluation in the case of Mr. Ross which was to focus on ways of obtaining a reduction in his sentence based upon the changes in the crack-cocaine guidelines. His case resided in the USDC ED MI (Case No. 88-cr-50005). Unfortunately upon completing this evaluation for counsel, Mr. Ross was unable to hire an attorney to represent him for this motion. However, we have learned that he did pursue filing this motion on his own after receiving our research and that his motion was granted. Mr. Ross' sentence was reduced from 360 months to 324 months - saving him three years in prison!

Gregro, J - NLPA was hired directly by counsel in the case of Mr. Gregro to assist with his sentencing arguments. The case was heard in the USDC of SC (Case No. 4:04-cr-00856-1). Mr. Gregro was facing a sentence of 27-33 months. However, at the sentencing hearing, the judge imposed a term of imprisonment of only 14 months - saving Mr. Gregro more than a year in prison.

Booty, T - NLPA assisted counsel for Mr. Booty in preparing research for his sentencing. The case was heard in the USDC ED of LA (Case No. 2:07-cr-00182-6). The PSI Recommendation in this case was 324-405 months. However, at the sentencing the court imposed 240 months - saving Mr. Booty more than seven years in prison!

Rodebaugh, R. - NLPA assisted counsel for Mr. Rodebaugh in raising arguments against the recommended guideline range of 360 months to life. His case was heard in the US District Court for the WD of MO (Case No. 2:06-CR-04002-1). At his sentencing the court imposed 262 months - saving him more than 100 months in prison! We are currently also now assisting in Mr. Rodebaugh's appeal and hope to report another successful outcome on this as well.

Tolulope J - NLPA Assisted counsel for Mr. John in the preparation of sentencing research designed to attack the 210-262/ 10-life guideline range that was recommended by the government. His case was heard in the USDC ED of VA (Case No. 2:05-cr-00153-1). At his sentencing the judge imposed a sentence of 105 months - saving Mr. John more than THIRTEEN YEARS in prison!

Davis, T. - NLPA assisted counsel for Mr. Davis in attacking his PSI recommendation of 92-115 months. His case heard in the USDC SD of NY (Case No. 7:06-CR-00913-2). At his sentencing hearing he received 72 months - saving him more than three years in prison!

Edouard, K. - NLPA assisted Mr. Edouard's counsel in the preparation of sentencing research designed to attack the government recommended guideline range of 210-262 months. His case was heard in the USDC SD of NY (Case No. 07cr00023). His sentencing

judge imposed a term of imprisonment of 108 months - saving Mr. Edouard nearly 13 years in prison!

Davis, D. - NLPA was hired directly by counsel in the matter of Mr. Davis to assist in the preparation of his direct appeal. His case was heard in the Ninth Circuit Court of Appeals (Case No. 06-10527). The court vacated and remanded his case to the district court with specific instructions on the modification of his sentence.

Dunson, C. - NLPA assisted counsel in Mr. Dunson's case to help attack the mandatory maximum 120 months for a weapon and guideline range of 130-162. His case was heard in the USDC SD of IN (Case No. IP06-CR-0147-01). At his sentencing he received 110 months - saving him approximately four years in prison!

Gray, S & M. - NLPA assisted counsel in the case of the Grays (a husband and wife) heard in the USDC of SC (Case No. 4:05-CR-00888). At the sentencing Mr. Gray received only 11 ½ years while his wife received five years - saving them both a significant amount of time.

Thompson, E. - NLPA assisted counsel for Mr. Thompson in the preparation of sentencing research designed to attack the recommendation of the government that he receive between 324-405 months! His case was heard in the USDC ED of AR (Case No. 4:06-cr-00220-1). At his sentencing the judge imposed only 120 months - saving Mr. Thompson more than TWENTY-THREE YEARS in prison!!

Strode, C. - NLPA assisted counsel for Mr. Strode in the preparation of sentencing research designed to attack the guideline recommendation of LIFE in prison. His case was heard in the USDC SD of IN (Case No. IP06-CR-0082-02-B/F). At his sentencing the court imposed a term of imprisonment of 192 months - saving Mr. Strode a number of years in prison (by avoiding a life sentence)!

White, E. - NLPA assisted Mr. White in the form of preparing a case evaluation to outline his options in pursuing a motion pursuant to the retroactive guidelines (§3582). This evaluation was prepared through the authorization of Attorney Charles Murray. Mr. White ultimately filed his 3582 motion pursuant to the recommendation of NLPA's evaluation and arguments contained therein. His case was heard in the USDC WD of VA (Case No. 5:04-CR-30068-1) where he received a reduction from 210 to 168 months - saving him more than three years off of the original sentence he was serving!

Smith, J. - NLPA assisted counsel for Mr. Smith in preparing for his sentencing which was being heard in the USDC SD of NY (Case No. 04-cr-00186-SCR-13). The PSI in Mr. Smith's case recommended a guideline range of 262-327 months. At his sentencing the court imposed a sentence of 165 months - saving Mr. Smith 162 months (MORE THAN

13 YEARS IN PRISON!

Mobley, D.- NLPA assisted Mr. Mobley's attorney in preparing research designed to keep his sentencing at the lowest level possible. His sentencing was heard in the USDC WD of NY (Case No. 1:06-CR-00228-1). The PSI in this case recommended a guideline range of 168-210 months. At his sentencing the court imposed a sentence of 122 months - saving Mr. Mobley more than **7 YEARS** in prison!

Dowell, F - NLPA assisted counsel for Mr. Dowell in raising all positive sentencing arguments to assist in attacking his guideline range of 262-327 months. His case was heard in the USDC SD of Indiana (Evansville Division) in case number 3:07-CR-00008-1. At his sentencing the judge imposed a term of 180 months imprisonment - saving Mr. Dowell more than **TWELVE YEARS** in prison!

Mitchell, S- NLPA assisted counsel for Mr. Mitchell in preparing for his sentencing. His case was heard in the USDC ED of MO (Case No. 4:07-CR-00184-6). NLPA was successful in helping counsel to obtain the mandatory minimum sentence for Mr. Mitchell which was Mr. Mitchell's hope in view of other information that could have been used against him to increase his PSI recommendation.

Beard, T - NLPA assisted counsel in the preparation of an appeal (6th CCA #06-1737). The case involved conspiracy to distribute controlled substance, heroin, possession with intent to distribute heroin, crack-cocaine, use of firearm in the furtherance of a drug trafficking crime and felon in possession of a firearm charges. Mr. Beard's appeal was granted in part and his case remanded for a re-sentencing to be held.

Joseph, J - NLPA assisted Mr. Joseph's counsel with the preparation of his direct appeal (11th CCA #07-15845) involving possession of narcotics charges. The court vacated and remanded the case for a re-sentencing.

Coleman, J - NLPA assisted counsel in the case of Mr. Coleman in the preparation of a petition for writ of certiorari. (7th CCA #06-3806) which was granted by the court.

Cannaday, S - NLPA assisted counsel for Mr. Cannaday in the preparation of a motion for bond pending trial (USDC ED WI #2:08-cr-00172-2). The court granted bond to Mr. Cannaday.

Mugweni, C - NLPA assisted counsel for Mr. Mugweni in the USDC ND of TX (Case No. 3:07-cr-00159-1) with sentencing research. The PSI Report in the case was recommending a guideline range of 135 to 168 months. At the sentencing hearing the court imposed a sentence of only 66 months - saving Mr. Mugweni more than **EIGHT YEARS** in prison!

Fenner, P - NLPA assisted counsel Charles Murray in the case of Mr. Fenner (USDC MD PA, Case No. 1:05-CR-00167-1) with sentencing research. The PSI in the case

recommended a sentence of 27-33 months. At the sentencing the court imposed a 21 month sentence - saving Mr. Fenner up to a year in prison.

LOUISIANA: DUE PROCESS VIOLATIONS OF COURT EXPOSED!

As you can see from the captioned newspaper article below, Jerrold Peterson, the clerk of courts for the Fifth Circuit Court of Appeals in Gretna, Louisiana has now exposed a practice that was ongoing for thirteen (13) years where the court routinely denied pro se petitions of defendants **without even reviewing them!** This unbelievable news only came to light after Mr. Peterson committed suicide and left a suicide note that explained his involvement in the denial of more than 2,500 appeals which were not given any judicial consideration whatsoever. According to Mr. Peterson's suicide note, he was instructed by the court to routinely prepare orders denying appeals and have those orders issued without the court even taking a look at the appeal.

It is important to note that even though a defendant may have served his time on a Louisiana charge, he may continue to suffer the effects of that conviction (ie, his right to vote, possess a firearm, etc may be restricted). He may face more penalties based on the prior conviction. In fact, many current federal inmates with prior convictions in Louisiana may have received statutorily increased federal sentences based upon their prior Louisiana conviction!

"IN A SUICIDE NOTE - REFLECTIONS OF GUILT"

Convicts who can't afford an attorney -- and there aren't many who can -- know the odds are stacked against them if they file an appeal

It is not unknown for inmates to have a legitimate grievance and for jailhouse lawyers to advance cogent and well-researched arguments on their behalf. But most "pro se" briefs are probably frivolous and nonsensical, and it is only natural that judges should tend to look askance as they buckle down to the task of reading them.

The judges weren't looking askance over at the state Court of Appeal in Gretna, however, because they weren't looking at all. For 13 years, the court ignored the lubrications of all convicts who appealed on their own account.

This immoral and apparently illegal policy

was in place until Jerrold Peterson, the staffer charged with implementing it, blew his brains out in May of last year. Peterson was driven to it in part, his suicide note suggested, by guilt over the nefarious tasks the judges made him perform.

In his note Peterson explained how the court gave indigent appellants the bum's rush.

Although every criminal writ application is supposed to be reviewed by three judges, he was deputed to winnow out any that had been filed pro se and arrange for their automatic rejection.

Thus were an estimated 2,500 appeals deep-sixed without any judicial consideration whatsoever.

That was not the only aspect of life at the Fifth Circuit that stuck in Peterson's craw. In his suicide note to the judges, he asked, "How many of you have called and asked me to 'handle' traffic tickets or to get someone out of jail without bond or to clear up contempt charges pending against friends? Never once have I declined to help someone you sent to me or refused to solve some problem you had."

Maybe the Judiciary Commission will be interested in the answer to those questions. But such ethical violations are small beer compared with the systematic denial of due process revealed by Peterson. So the state Supreme Court, after receiving petitions from hundreds of appellants spurned by an idle and unprincipled Fifth Circuit, has stepped in. Kinda.

The solution, the Supreme Court has decided, can safely be entrusted to the idle and unprincipled Fifth Circuit, which kindly volunteered to take a belated look at the appeals once Peterson had blown the whistle.

The flaws of that arrangement might seem obvious, but only Justice John Weimer noticed.

In his dissent Weimer wrote that only another circuit or an ad-hoc panel could handle the review without an "appearance of impropriety."

Edward Dufresne, Chief Judge of the Fifth Circuit, took charge of pro se appeals in 1994. He then had Peterson prepare rulings denying writs for all of them and signed off "without so much as a glance," according to the suicide note. "No judge ever saw the writ application before the ruling was prepared by me," Peterson wrote in a second suicide note to the Judiciary Commission.

The rulings also bore the names, though not

the signatures, of judges Marion Edwards and Wally Rothschild. Neither Edwards nor Rothschild had any clue as to what was in the applications, or even knew that they had been filed, according to Peterson.

Dufresne, Edwards and Rothschild will not participate in reviewing the old appeals, which will be left to three-judge panels drawn from their five colleagues.

But the arrangement must strike the public as fishy, if only because the Fifth Circuit may not be all that keen to uncover miscarriages of justice within its own walls.

Dufresne appears to be the villain of the piece, but it is hard to believe that not one of the other judges noticed they never saw a pro se appeal in 13 years. In his suicide note, Peterson seemed to blame them all, thus: "You completely ignore your own integrity in the handling of pro se criminal writ applications."

He also noted the court charged local government \$300 for each pro se appeal. When you can read not a single word and still charge about \$75,000, you have a good racket going.

And all the while those poor suckers in the pen -- some of whom must surely have gotten a raw deal at trial -- were beavering away under the illusion that the Fifth Circuit was in the business of dispensing justice and upholding the Constitution.

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James Gill is a staff writer. He can be reached at jjill@timespicayune.com
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If you have a client who may have been adversely effected by this illegal and unconstitutional practice, please get in touch with NLPA. Additionally, if your client is interested in participating in a class-action suit concerning this matter, please let us know.

CASES OF INTEREST

US v. Whitley - In June, the United States Court of Appeals for the Second circuit decided a case that could have significant positive impact on individuals serving sentences for carrying, brandishing or discharging a firearm under 18 U.S.C. § 924(c) who were also sentenced as armed career criminals based on the same firearm. United States v. Whitley, 529 F.3d 150 (2nd Cir. 2008). Whitley participated in an armed robbery of a delicatessen in the Bronx in November 2004, during which he emptied the store's cash register, pointed a gun at employees, and inadvertently discharged

the firearm, injuring himself in the face. The indictment charged three counts. Count One charged a Hobbs Act robbery, in violation of 18 U.S.C. § 1951. Count Two charged using, carrying, and possessing a firearm that was discharged during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(iii). Count Three, the armed career criminal offense, charged possessing a firearm after having been convicted of at least three violent felonies or serious drug offenses, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e). The jury ultimately returned guilty verdicts on all three counts. Whitley's pre-sentence report ("PSR") calculated an adjusted offense level of 34, based on a grouping of Counts One and Two, which, in Criminal History Category VI, yielded a sentencing range of 262 to 327 months. The PSR recommended a consecutive 120-month sentence on Count Two. Judge Casey sentenced Whitley to concurrent terms of 262 months on Counts One and Three, plus 120 months consecutively on Count II.

The validity of Whitley's 10-year consecutive term depended on the proper construction of the language contained in 18 U.S.C. § 924(c)(1)(A). The Second Circuit determined that the "except" clause of 18 U.S.C. § 924(c)(1)(A) should have been read literally. If the "except" clause of 18 U.S.C. § 924(c)(1)(A) meant what it literally said, the 10-year minimum sentence required by 18 U.S.C. § 924(c)(1)(A)(iii) of that subsection for discharge of a firearm, which had to run consecutively by virtue of 18 U.S.C. § 924(c)(1)(D)(ii), did not apply to Whitley because a greater minimum sentence was otherwise provided by law, namely, 18 U.S.C. § 924(e), which subjected him to a 15-year minimum sentence. Thus, the clause exempted Whitley from the consecutive 10-year minimum sentence for discharging a firearm because he was subject to the higher 15-year minimum sentence provided by 18 U.S.C. § 924(e). Accordingly, the case had to be remanded for resentencing.

The only other United States Circuit Court of Appeals to address the issue has been the Fifth Circuit. *See United States v. Kyles*, 2008 U.S. App. LEXIS 25908 (5th Cir. Tex. Dec. 19, 2008). The Fifth Circuit found that any sentencing error (which was nearly identical to the error addressed in Whitley) was not clear or obvious based on other circuit decisions rejecting the same argument put forth in Whitley. Specifically, the Fifth Circuit cited three decisions that are contrary to Whitley's interpretation of the statute: United States v. Jolivette, 257 F.3d 581, 586-87 (6th Cir. 2001), United States v. Studifin, 240 F.3d 415, 423-24 (4th Cir. 2001), and United States v. Alaniz, 235 F.3d 386, 387-89 (8th Cir. 2000). Moreover, the Fifth circuit had previously agreed with the Fourth, Sixth, and Eighth Circuits'

interpretation, although only in an unpublished decision. *See United States v. Collins*, 205 F. App'x 196, 198 (5th Cir. 2006) (per curiam).

One other Circuit Court and several United States District Courts have addressed claims based on Whitley, but as of yet none of them have actually reached a decision on the issue, deciding the respective cases on other grounds without analyzing the Second Circuit's logic. *See United States v. Parker*, 2008 U.S. App. LEXIS 24215 (1st Cir. N.H. Nov. 26, 2008); *Davila v. Grondolsky*, 2008 U.S. Dist. LEXIS 62160 (D.N.J. Aug. 11, 2008); *Blackstock v. United States*, 2008 U.S. Dist. LEXIS 66985 (E.D. Va. Sept. 2, 2008); *Randolph v. United States*, 2008 U.S. Dist. LEXIS 101558 (M.D. Fla. Dec. 5, 2008).

The Whitley decision could prove to have broad ranging impact on individuals serving sentences under 18 U.S.C. § 924(c). This is especially true if they were also sentenced as armed career criminals. We can only speculate at this time what the full scope and impact of the Whitley decision will ultimately be. However, it could potentially benefit thousands of federal inmates.

US v. Joseph - Challenging Career Offender Enhancements:

Often, NLPA is contacted by attorneys who represent defendants wishing to challenge an unjust sentence, especially when the sentence is based upon a career offender enhancement under the federal sentencing Guidelines. The case of United States v. Joseph, crim. no. 05-20467-CR-PAS (S.D.Fl. 2009) demonstrates how NLPA can assist counsel in the preparation of sentencing arguments regarding challenges to the imposition of the career offender enhancement. In Joseph, Mr. Joseph entered a guilty plea to a drug related offense. Mr. Joseph proceeded to sentencing on September 30, 2005, or after the decision in United States v. Booker, 125 S.Ct. 738 (2005) was issued. Mr. Joseph was sentenced to an enhanced term of incarceration as a career offender pursuant to U.S.S.G. § 4B1.1. Wisely, Mr. Joseph challenged the imposition of the career offender sentencing enhancement, as well as the discretion of the sentencing court post-Booker to issue a sentence below the Guidelines. Mr. Joseph was unsuccessful regarding the issues raised at sentencing.

Mr. Joseph then appealed. On appeal (appeal no. 07-15845 (7th Cir. 2008)), attorney Keith E. Golden with NLPA's assistance, attacked the career offender enhancement under a three pronged approach, claiming that: (1) the district court erred in punishing Mr. Joseph as a career offender based upon judicial finding that a previous conviction was a crime of violence pursuant to U.S.S.G. § 4B1.1; (2) the district court erred in increasing Mr. Joseph's sentence as a career

offender pursuant to U.S.S.G. § 4B1.1 based upon facts that were neither admitted nor found by a jury; and (3) the district court erred in issuing a sentence greater than necessary to achieve the goals of sentencing, resulting in a plainly unreasonable sentence under United States v. Booker and 18 U.S.C. § 3553. Argument #1 rested upon the claim that the prior conviction, for carrying a concealed weapon, was not an active crime in which danger of injury was present. Argument #3 rested upon the claim that Mr. Joseph's prior convictions were over-representative of Mr. Joseph's criminal history.

The appellate court agreed with the arguments presented by NLPA and Mr. Golden ordered Mr. Joseph's sentence be vacated so that he could be re-sentenced without the career offender enhancement. The court found merit in issue #1, as listed above. Specifically, the court found that carrying a concealed weapon could not be considered a crime of violence under Florida law under the decision issued in United States v. Archer, 531 F.3d 1347 (11th Cir. 2008). NLPA traced the line of thought that ultimately led to the Archer decision and the finding that carrying a concealed weapon under Florida law is not a crime of violence for purposes of the federal career offender enhancement. The court, having issued relief on issue #1, did not address issues #2 and #2, meaning that the issues can be raised again in future appellate action should it be necessary.

Mr. Joseph appeared for re-sentencing on February 5, 2009. Mr. Joseph now only faced a Guideline range of incarceration of between 70 and 87 months. This was quite a change from Mr. Joseph's Guideline range of incarceration prior to his successful appeal, which was for between 188 to 235 months incarceration. However, not content with the Guideline range, Mr. Golden with the assistance of NLPA, prepared argument that Mr. Joseph's sentence should be no greater than 60 months. While unsuccessful in the bid for a below Guideline sentence, the argument presented by Mr. Golden resulted in Mr. Joseph receiving a 70 month sentence. **THIS SAVED MR. JOSEPH 98 YEARS IN PRISON.**

The bottom line is that being labeled a career offender does not foreclose argument and review regarding this classification. Such a label is merely a starting point in the calculation of a sentence under the federal sentencing Guidelines, and is subject to challenge from many different arguments. From challenging the constitutionality of such a classification to attacking the underlying convictions to challenging the reasonableness of a sentence, NLPA has been at the forefront of attacking insidious and unfair sentencing enhancements. Should your clients find themselves in

similar situations to Mr. Joseph, NLPA stands ready to assist you in the research and preparation of any motions necessary to assist you in the vigorous defense of your clients.

RECENT FEDERAL COURT RULING ORDERING THE RELEASE OF CALIFORNIA INMATES

Recently the United States Court of Appeals for the Ninth Circuit affirmed a decision by a United States District Court Judge in California directing that the California Department of Corrections release 57,000 inmates over the next two to three years. This figure represents roughly one-third of all state inmates in California. This decision could substantially effect inmates serving shorter sentences and even those serving longer sentences for non-violent and possibly even violent crimes. Naturally, the California Department of Corrections is scrambling to determine what to ultimately do about the ruling. First and foremost, they will be appealing the ruling to the United States Supreme Court, and will likely not take substantial steps towards releasing inmates early until a final decision has been rendered by the country's highest court. This could take some time, since the state has nearly three months before it even has to file its appeal with the U.S. Supreme Court. It will probably take several more months for the Supreme Court to hear the case and issue a decision. If the Supreme Court denies the State's appeal, California will have no choice but to address the problem and either release one-third of its inmates, make arrangements for them to be incarcerated in private institutions out of state, or rapidly construct additional prison facilities to rectify the overcrowding problem.

Of course, the question as to what inmates will be effected by this ruling if California is ultimately required to release inmates will be left to the discretion of the California Department of Corrections. Most likely they would begin releasing non-violent offenders first to satisfy the quota, and then presumably even violent offenders who have already served a substantial portion of their sentences, even if those sentences were fairly lengthy. Serious violent offenders and sex offenders will no doubt be the last inmates considered for early release. Even if the state makes substantial efforts to rectify the current overcrowding problem, it would

appear that some early releases will be necessary if the ruling is not overturned by the Supreme Court. There simply are not enough out of state private institutions available to transfer 57,000 inmates, and California's budget crisis will not permit the expedited construction of enough new prisons to completely handle such a high number of inmates. Unfortunately it is way to early to tell if, when, and why certain California inmates will be released.

CALIFORNIA INMATE RELEASE PROMPTS PUBLIC SAFETY DEBATE

BY: DON THOMPSON

SACRAMENTO, Calif. (AP) — Without a U.S. Supreme Court reprieve, California will have to free roughly a third of its prison inmates in a few years, and how that can be done safely is still hotly debated.

Corrections officials said Tuesday they are struggling with their response to a tentative federal court ruling this week that the state must remove as many as 57,000 inmates over the next two or three years.

The state's 33 adult prisons now hold about 158,000 inmates. But the judges said overcrowding is so severe it unconstitutionally compromises medical care of inmates, and releasing prisoners is the only solution.

"We are just now beginning to have discussions (about) who these types of inmates would be. Then, how do we get to that number?" said Matthew Cate, secretary of the state Department of Corrections and Rehabilitation.

The department has no contingency plan, he said, other than appealing to the U.S. Supreme Court once the ruling becomes final.

The judges said their ruling does not amount to throwing open the cell doors.

"The state has a number of options, including reform of the earned credit and parole systems, that would serve to reduce the population ... without adversely affecting public safety," they judges wrote in the decision released Monday.

Gov. Arnold Schwarzenegger already has asked lawmakers to take a number of steps to reduce the inmate population:

- Ending parole for former inmates not convicted of a violent or sex-related crime. That would lead to fewer parolees being sent back to prison because they violated rules.

- Raising the monetary limit for property crimes to be considered felonies. That would send more petty thieves to county jails instead of state prisons.

- Giving inmates more early release credits for completing educational or vocational programs.

Even if all Schwarzenegger's proposals were adopted, they still would fall short of the judges' target, said Cate, the corrections secretary.

Freeing or diverting inmates as the judges suggest is "a dangerous game of Russian roulette," said Stanislaus County Chief Probation Officer Jerry Powers, who heads the statewide chief probation officers association.

He said counties lack the capacity to handle additional offenders.

Law enforcement groups also object that Schwarzenegger's proposal would rule out prison for those convicted of drug offenses, drunken driving, white collar or property crimes such as vehicle theft, grand theft or receiving stolen property, among others.

The state likely could not reach the judges' target without also freeing some serious repeat offenders and inmates serving life sentences, they said.

Republican Assemblyman Jim Nielson, a former chairman of the state parole board, said California should accelerate construction of new prison cells to ease the overcrowding rather than release inmates, although building plans have stalled for nearly two years.

The state already has transferred 6,600 inmates to private prisons in other states, and could try to boost the transfers as an alternative to freeing convicts early.

ATTORNEY NEWS SPOTLIGHT

Courtesy of Robinson & Brandt, PSC
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MANDATORY MINIMUMS MAY NOT STOP - MOTIONS FOR REDUCTION OF SENTENCE UNDER 18 U.S.C. § 3582

As most people reading this newsletter know, U.S. Sentencing Guidelines Amendment 706 increased the weight of cocaine base (the name the feds use for crack cocaine) needed to apply base offense levels. Those base offense levels are the key component of calculating the sentence range under the Guidelines. The amendment means a two-level reduction to the base offense levels and better sentences for drug amounts that used to carry higher penalties.

The Amendment was all about the *Guidelines calculations*, and not about statutory ranges or whether judges could impose sentences outside the new Guidelines ranges.

We have noticed that some people have been confusing the amended crack cocaine Guidelines with the U.S. Supreme Court decisions in Gall v. United States, 128 S. Ct. 586 (2007), and Kimbrough v. United States, 128 S. Ct. 558 (2007). Those cases did not reduce penalties for crack cocaine offenses. Instead, they make clear that judges have authority to enter a sentence *below* the Guidelines based on many reasons, including the unjust disparity between crack and powder cocaine penalties. Fortunately, Amendment 706 plus Gall and Kimbrough mean that defendants have more arguments than ever before on why a lower sentence is appropriate.

Meanwhile, neither the amendment nor these recent Supreme Court decisions specifically addressed an issue important to many of you – statutory minimums. You may be wondering, if your sentence is at or near a statutory minimum, can you do anything to reduce your sentence?

While the Kimbrough and Gall cases made clear that the judges could go below the Guidelines range, they did not state that judges could go below the minimums *for that reason*. But that does not mean a motion for reduction of sentence under 18 U.S.C. § 3582(c)(2) cannot get certain defendants below the minimum. For example, if a defendant had the benefit of a motion granted that reduced his sentence and, by law, would also allow a sentence below the statutory range, a § 3582 motion could be set up to request a reduction in the base offense level, the Guidelines range, and then re-apply the reduction previously used, which will (again, or for the first time) get the defendant below the minimum. The events that can get a defendant below the minimum are motions filed under 18 U.S.C. § 3553(e), U.S.S.G. § 5K1.1, Rule 35, or the safety valve.

Accordingly, many defendants and inmates are being misled to believe that because they have sentences already below the minimum, at the minimum, or just above mandatory minimums, they have *no chance* under § 3582. Although an attorney is certainly needed to review each case, the defendants should know the truth. You or anyone you know in a situation like that should contact our office or another trusted, experienced national law firm.

TWO-LEVEL REDUCTIONS ARE NOT ENOUGH TO CORRECT THE CRACK- POWDER DISPARITY

Amendment 706 is an important step in the right direction for sentencing those who have been found guilty of a federal offense and end up being sentenced based upon

crack. But even with this positive two-level reduction in base offense levels, several problems remain with tens of thousands of federal sentences based upon crack cocaine weights.

The Supreme Court in Kimbrough noted that the disparity between crack cocaine and powder cocaine was based upon "assumptions about the relative harmfulness of the two drugs" that "more recent research and data no longer support." Kimbrough, 128 S.Ct. at 566. The Sentencing Commission did not completely correct those incorrect assumptions with Amendment 706. The Kimbrough Court noted that, although the Commission has recommended that the punishment disparity between crack and powder be "substantially reduced," the modest amendment lowering the offense level by two still "yields sentences for crack offenses between two and five times longer than sentences for equal amounts of powder." Id. at 569. In other words, the Commission and the Supreme Court recognize that the two-level reduction is not enough to rectify the great injustices in thousands of federal sentences.

Because the district courts have a statutory obligation to consider the applicable 18 U.S.C. § 3553(a) factors, we have been arguing that the judges should recognize these ongoing problems with the crack/powder ratio, ignore contrary policy statements, and consider itself free to impose a sentence below the Guidelines range in all cases involving crack cocaine. If you or someone you know is going forward with a § 3582 motion based upon Amendment 706, strongly consider whether asking for nothing more than a two-level reduction is enough.

CONSIDER GETTING AGGRESSIVE PRIVATE COUNSEL FOR YOUR § 3582(c)(2) MOTION

You may be surprised to see what some attorneys, including court-appointed attorneys, are filing as motions for reduction of sentence under 18 U.S.C. § 3582(c)(2) and Amendment 706. We have seen several motions just three pages long with a few paragraphs about the inmate's case and maybe three paragraphs on why a two-level reduction should be applied. These motions do not have anything in them about asking for more than two levels or sentences below the Guidelines range.

As we have discussed in previous editions of *The Bulletin*, we believe it is a mistake to simply ask for a two level reduction. Some courts have already held that the decision in Booker applies to new sentencing under § 3582(c)(2). Therefore, we advance the argument that the court may take into consideration a defendant's good conduct, rehabilitation, family circumstances, etc., and sentence defendants well below the range

produced through the application of the two-level reduction.

CASE LAW UPDATE: USING THE ALL WRITS ACT

Since a Ninth Circuit decision last year, our firm has been closely watching case law concerning the All Writs Act, 28 U.S.C. § 1651 for developments and potential favorable rulings that may open the door for several of our current and former clients. And a case out of the Western District of Washington gives new hope for those still fighting for application of the rules from Apprendi v. New Jersey and Booker v. United States to their cases that became final before 2000.

In Donald Kessack v. United States, No. C05-1828Z, 2008 U.S. Dist. LEXIS 7729 (W.D. Wa., Jan. 18, 2008), a district court judge granted a petition for writ of *Audita Querela* under § 1651. Interestingly, the particular circumstances under which the judge granted the petition are the type of circumstances that several of our law firm's clients face. The district court sentenced the petitioner in 1990 to a term of 30 years for offenses including conspiracy to distribute cocaine. Although others were indicted and sentenced, none of the petitioner's co-defendants remained in prison. Because of the age of the case, the petitioner had been sentenced under the mandatory Guidelines, and his sentence was greatly increased based upon judicially-imposed enhancements.

The petitioner raised Booker issues – that he was incorrectly sentenced under the mandatory Guidelines and deserved to be re-sentenced under the advisory Guidelines. The district judge in Kessack concluded that the petition was not a successive motion under 28 U.S.C. § 2255 because the petitioner had no other way of raising the issue because, at the time the petitioner filed his § 2255 motion, Booker had not been decided and could not have been foreseen. The judge also concluded that case law foreclosing retroactive application of Booker had not addressed retroactivity to cases brought under an *Audita Querela* petition. Because this petition can be used to achieve justice in extraordinary situations when no other post-conviction remedies are available, Supreme Court case law did not preclude application of Booker to this older case.

If you or someone you know has a

conviction that became final before Apprendi, and whose § 2255 motions were filed and lost (or were not filed by a one-year deadline) before Apprendi, an *Audita Querela* petition may be a way to get back before the district court to be sentenced in light of Apprendi. The same is true for many of you whose convictions became final before Booker and who seek a new sentence under the advisory Guidelines. It is patently unfair that, because of the age of some cases, many of you received sentences that are simply now illegal. In those cases, it may turn out that a petition for writ of *Audita Querela* under 28 U.S.C. § 1651 is the right next step.

Although we have a few clients that are already strongly considering this option, it may not yet be time to declare this avenue the definitive option. In Carrington v. United States, 503 F.3d 888 (9th Cir. 2007), the Ninth Circuit rejected a similar argument. The good news is that the defendant in Carrington has filed a petition for rehearing and for rehearing en banc. We await the result. Moreover, several other circuits have never even seen the line of argument that succeeded in Kessack. Those of you who wish to be aggressive, understand the risks, and can afford private counsel might consider the option now. Our office is willing to take these cases, and look forward to once again being on the leading edge of the fight for relief for citizens who remain unconstitutionally and illegally sentenced.

INTERESTED IN HIRING NLPA?

Do you have pressing deadlines? - Give us a due date and you can relax. Have a brief due? - Call us for a free preliminary consultation so we can determine a cost estimate. NLPA can provide anything from a research memorandum to a file-ready brief - whichever you may need. If you're considering hiring someone to assist with your criminal proceedings, NLPA offers realistic fees that may suit you in your pursuit of finding top-notch yet affordable legal research & consulting assistance. We believe you will find our fees to be extremely competitive compared to other legal research firms in the country. We also have several alternative options for paying

our fees.

- NLPA can accept payment via cashier's check or money order through the mail.
- We also can accept credit/debit card payments over the telephone as well as electronic check (check by phone) payments over the telephone.
- For most services provided NLPA also offers payment plans as well. With a minimum down payment you could soon be financing your legal fees.

Therefore, if you are interested in discussing the financing options available to you for your specific matter, please contact us. NLPA assists in virtually every stage of criminal proceedings from pretrial to post-conviction and also assists in immigration matters. For additional information on the services offered by National Legal Professional Associates please contact our offices.

DON'T FORGET!

NLPA also can now assist you in finding financing for your legal defense needs. We are pleased to spotlight Lenders Financial Group (LFG) once again as a way in which EVERYONE can afford the legal team they deserve! LFG can assist in a number of different loan programs. LFG also assists in areas other than legal defense. You can learn more by visiting their website at: www.lendersfinancialgroup.com.

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